

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

TSEKO JACOB MPASA ALIAS JAMES SEKHONYANA
LETSIE
MOHAU TAKANE
MOHOLI CHAKA

1st Accused
2nd Accused
3rd Accused

J U D G M E N T

Delivered by the Honourable Chief Justice
Mr. Justice J.L. Kheola on the 20th day of
June, 1994

The accused is charged with fraud and the indictment reads as follows:

"In that upon or about the 7th day of July, 1989 and at or near Lesotho Bank in the district of Maseru, the said accused, one or the other or all of them, did unlawfully and with intent to defraud, misrepresent to the Lesotho Bank that a sum of M118,726.30 had been properly deposited into the current account No.0360004034 of the first accused, Tseko Jacob Mpasa, which the said account was maintained at the Industrial Branch of

the Lesotho Bank, at Moshoeshoe Road Maseru, and did thereby cause the officials of the Lesotho Bank to credit the said account of the first accused with the sum of M118,726.30 from which funds the first accused be entitled to make withdrawals for his benefit, and the said accused did by means of the said misrepresentation induce the Lesotho Bank, to its loss and prejudice, to allow the first accused to make withdrawals from his said current account in the sum of M5,200.00 whereas the said accused, when they made the aforesaid misrepresentation, well knew that no proper and genuine deposit in the sum of M118,726.30 had been made into the account of the first accused and that he was not entitled to make withdrawals from his said current account utilising the sum of M118,726.30 which had been fraudulently deposited into the current account of the first accused; and thus the said accused did commit the crime of FRAUD".

In the alternative he is charged with theft of

the same sum of money by false pretences.

The misrepresentation that led to the inducement which in turn resulted in the prejudice and loss to the Lesotho Bank was that the sum of money aforesaid was honestly and genuinely or bona fide deposited into the accused's account and that the accused was thereby and accordingly entitled to that amount. In other words the said money thereby became his, to deal with as his own property.

In *Makalo Khiba v. Rex*, 1980 (1) L.L.R. 10 at p. 17 Maisels, P said:

"Theft consists in an unlawful contrectatio with intent to steal of a thing capable of being stolen. Cf. Hunt op cit p.566. That money is capable of being stolen, even where it is not corporeal cash, but is represented by a credit entry in books of accounts appear to be clear."

On the 5th June, 1989 a false credit voucher (Exhibit "H") credited the current account of the accused with the amount of M118,726.30. The accused's current account is No.0360004034. The credit voucher

purported to have its instructions originating from Pretoria per a Telegraphic Transfer as per telex message dated the 5th June, 1989 No. 005-90 less charges. The Crown called a number of witnesses whose evidence proved beyond any reasonable doubt that the credit voucher in question is a false document.

P.W.8 Palo Kotelo is the Assistant General Manager of the Lesotho Bank. He testified that Exhibit "H" was a false document and showed the Court a number of abnormalities on it. It ought to have two date stamp impressions - one of the bank that sent it in and another of the Forex Department of Lesotho Bank. Exhibit "H" has no date stamp of a bank which sent it in. It bears the stamp of the Clearances Department of Lesotho Bank but no Forex Department of Lesotho Bank and yet if it came from Pretoria by telex it ought to have been handled by the Forex Department.

The signature on Exhibit "H" was unknown and therefore false because it originated within the Bank but does not bear a signature of any of the Bank employees.

The date on Exhibit "H" is the 5th June, 1989 but

the date on the stamp impression is the 7th July, 1989. That was very unusual.

In telegraphic transfers banks usually use telegrams or telex which goes to the Forex Department where the message is tested to find out whether it is a true message. After the test they write the credit voucher and put the test number on it and not the telex or telegram number. the credit voucher is then stamped with the Forex Department's date stamp. Exhibit "H" has none of these features and yet it purports to have come through the Forex Department.

It is quite clear that Exhibit "H" is a sham and it can reasonably be inferred that it was made by either one of the employees of the Bank who disguised his or her own handwriting and signature, or it was prepared by someone outside the Bank. It seems to me that this was an "inside job" in which an outsider was involved. I shall deal with the question of the identity of the outsider at a later stage in this judgment.

It is common cause after the accused's current account was credited with the amount of M118,726.30 by

false pretences, he (accused) withdrew an amount of M4000-00 on the 8th July, 1989 per cheque no. AF8609 at Maseru Industrial Branch; on the 11th July, 1989 he withdrew M1200-00 at the Quthing branch of Lesotho Bank. On the same day he attempted to withdraw M6400-00 per cheque no. AF8615 but he was arrested.

The other cheques were already signed but were not cashed i.e. cheque no. AF8610 for M6000-00 dated the 10th July, 1989; cheque no. AF8614 for M6400-00 undated; cheque no. AF8613 for M6400-00 undated; cheque leaves nos AF8601 - AF8609 are no longer in the cheque book and it is not clear what has happened to them. These cheques which had not been cashed show that the accused intended to withdraw a substantial amount within a fairly short period of time.

It will be convenient at this stage to deal with the evidence of some of the people to whom the accused spoke and explained who he was. P.W.1 Lipolelo Nthebe testified that she was a teller at the Industrial Branch of Lesotho Bank. On the 8th July, 1989 the accused presented to her a cheque for M4000-00 which he wanted to cash. She referred the cheque to the Ledger Department for the verification of the

signature. While they were waiting for verification she had a chat with the accused. She asked the accused as to where he was practising as a medical doctor. She asked this question because according to his passport the accused was described as a medical doctor. In answer to her question the accused said he was a doctor in Mafeteng. P.W.1 asked him as to where he had obtained the money. He said that the money came from Lybia where he was a student. It was in dollars which he converted into the local currency.

P.W.2 M. Kaphwiyo testified that in 1989 she was the Manager of the Industrial branch of Lesotho Bank. On the 11th July, 1989 the accused was referred to her because his current account had been frozen. She asked him where the credit deposit in his account had originated. He said that he was not sure where the funds came from, all he knew was that they came from an overseas donor. He did not know the donor but one Colonel Sekhobe Letsie knew the donor. The funds were intended for the building of a chemist at T.Y. which was a joint venture between him and Colonel S. Letsie.

P.W.4 Toka Sekhonyana was a data control supervisor at Quthing branch of Lesotho Bank. In

July, 1989 the accused came to their bank with a cheque for M1200-00 which he wanted to cash. The drawer of the cheque was Dr. Letsie. P.W.4 says that in his conversation with the accused the latter explained that he was a doctor and that he was in a hurry because he had some patients at Quthing Government hospital who needed his immediate attention. As a result of the accused's explanation as to his position at the hospital, P.W.4 took him to a teller and asked that Dr. Letsie (accused) should be given quick service.. That was done.

P.W.5 Lekhooa Pitso testified that in July, 1989 he was the accountant at the Industrial branch of Lesotho Bank. In July, 1989 the accused came to him and introduced himself as Dr. James Sekhonyana Letsie. He produced a passport which described him accordingly. The accused filed an application form for a current account. (See Exhibit "C"). In that application form he recorded that he was a medical doctor employed by Lesotho Government and that his income was M1300-00.

P.W.5 says that he had a chat with the accused in order to establish whether the accused was a fit and

proper person to open and run a current account. The accused said he was a medical doctor working at Mafeteng. He was opening the current account because there was a project of a chemist at T.Y. which he intended to open jointly with Colonel Sekhobe Letsie. He was waiting for the money that would be coming into his account. On the 11th July, 1989 the accused said that the money came from an overseas country but he did not know the country, however Colonel Sekhobe Letsie knew it.

P.W.9 John Ramoholi testified that during his investigations he had the chance to confront the accused with Colonel Sekhobe Letsie. The latter denied that he had any joint venture with the accused. He said the accused had given him an article to read and to consider it.

In his defence the accused said that the money came from Pretoria. He had written an article and had given it to one Derrick Benson who was to sell it to the newspapers. The proceeds from that sale were supposed to be paid into his current account at the industrial branch of Lesotho Bank. He had opened that account with the hope that Derrick Benson would fulfil

his obligation and pay the money into his (accused's) account. It is not clear whether Benson fulfilled his obligation or not. However the accused went to him when he was arrested and charged with fraud. Benson said he would come and help him at the trial. When he later went to Benson's residence in Johannesburg he had vanished into thin air. The money was intended for the building a printing press.

There are a number of points to be considered by the Court to establish whether the story of the accused is reasonably possibly true or not.

The explanations which the accused gave to different people about the origin or source of his funds differ from the explanation which he gave to this Court. He now says that the money comes from the sale of his article by one Derrick Benson who cannot be found anywhere. It no longer comes from Lybia where he was a student, nor from an overseas donor who is known only by Colonel Sekhobe Letsie.

It is significant to note that on the 22nd February, 1989 the accused applied for a new passport. He gave his occupation as a medical doctor. When he

opened his current account he continued to allege that he was a medical doctor who was stationed at Mafeteng Hospital. He said he was an employee of the Government of Lesotho; that his salary was M1300-00. These are the things which the accused wrote in his application for the opening of the current account (See Exhibit "C"). The question is why did the accused make the misrepresentation about his position and status in life? He first of all lied when he applied for a passport by saying that he was a medical doctor. He now says that when he opened his current account the accountant said he must perpetuate the misrepresentation that he was a medical doctor because that was what appeared in his passport.

The accountant has denied this spurious allegation against him. In any case it is improbable that a senior official of the Bank can allow a new customer who is opening a current account to use false allegations just for the sake of enabling him to open the account quickly. Bankers are always very careful about the opening of a current account to a new customer because its misuse by a thief or unreliable person may cause serious problems for the Bank. In the present case the Bank has already lost a

substantial amount of money which cannot be recovered.

It is again significant that when the accused was cashing his second cheque at the Quthing branch of Lesotho Bank he alleged that he was a medical doctor and purported to be in a hurry to go back and attend to his patients. In his evidence and submissions the accused's story is that the Court must assume that it was a mere coincidence that at the time he was expecting his account to be credited with a huge amount from Benson, someone within the Bank fraudulently "diverted his money to somewhere else" but at the same time crediting his account. It was a payment for an article he wrote which Benson sold on his behalf and which sold very well. He submits that Colonel Sekhobe confirmed that he was given an article to consider. If the money was irregularly deposited into his account he was not aware of this and genuinely believed that it had come from Benson. If the irregularities occurred he was not a party to them. He has been cheated by someone or others in the Bank by diverting his money to somewhere else.

The accused submitted that there is a possibility of truth in his statement that he was expecting money

from Benson. His story has not been shown to be palpably false as to be totally rejected, doubt must exist as to whether he knowingly and intentionally defrauded the Bank.

Mr. Lenono, counsel for the Crown, submitted that in the light of the divergent and inconsistent explanations there is absolutely no room for a benefit of doubt that may be accorded the accused. He referred to R. v. Mlambo, 1957 (4) S.A. 728 at p. 738 where the Court said:

"An accused's claim to the benefit of doubt, when it may be said to exist, must not be derived from speculation but must rest upon a reasonable and solid foundation created whether by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

He submitted that the Crown proved its case through positive evidence that the crediting of accused's account was a sham and fraudulent and that the reasonable inference was that the accused knew of

the fraudulent scheme and partook in the theft of the Bank's money.

In the frequently quoted passage from the judgment of Greenberg, J. in R. v. Difford, 1937 A.D. 370 at p. 373 the learned Judge said:

"..... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

In R. v. M. 1946 A.D. 1023 at p. 1027 Davis, A.J.A. said:

".... the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a

reasonable possibility that it may be substantially true."

In *Miller v. Minister of Pensions*, (1947) 2 All E.R. 372 at p. 373 Lord Denning said:

".... It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Looking at the evidence as a whole I have no alternative but to come to the conclusion that the accused was involved in the fraud from its inception. He was, in fact, the master mind behind it. He first of all obtained a passport in which he falsely said he

was a medical doctor. He went further and opened a current account in which he perpetuated the lie that he was a medical doctor, but even went further to say that he was stationed at Mafeteng Hospital as an employee of Lesotho Government and that his salary was M1300-00. At Quthing branch of Lesotho Bank he continued to lie that he was a medical doctor.

The accused is nothing but a liar who was fortunately caught before he caused a very great loss to Lesotho Bank. There is absolutely no doubt that in carrying out his plan to defraud the bank he worked jointly with a person or people who worked in the Bank, possibly A2 and A3 who were acquitted at the close of the Crown case. They were acquitted because the evidence which implicated them, or at least, one of them, was a confession which was unlawfully obtained from him. The other accused gave a story which was totally exculpatory. However both of them knew that there were people who were preparing to defraud the Bank. As I said earlier in this judgment the fraud was partly an inside job. The accused was apparently the only outsider. I totally reject his story that he knew nothing about the fraud. His explanation is palpably false beyond any reasonable

dóubt.

The accused's explanation cannot be reasonably possibly true for obvious reasons which I have stated above. He made an elaborate plan to defraud the Bank. He started with the lies when he applied for a passport, the lies when he opened his current account, the lies to various people about his being a medical doctor, employed by the Government of Lesotho and stationed at Mafeteng. Finally he lied about the origins of his funds.

The accused lied about his literary ability to write an article which can sell for such a large amount of money. In any case he never even produced a copy of such article or a newspaper or a magazine in which such a good article was published. It seems to me that the elusive Derrick Benson does not exist. He is a figment of the accused's imagination. He alleges that this elusive Benson promised to come and assist him at the trial. He does not say that he saw the papers which showed that Benson had actually transferred funds to his (accused's) current account at the industrial branch of Lesotho Bank. The truth of the matter is that no such funds ever reached

Lesotho Bank either by telegram or telex from Pretoria. The accused wants this Court to believe that some person in the bank diverted those funds to his or her own use; and that at the same time some person or persons who is or are employees of the bank fraudulently credited his current account with a large amount of money and immediately destroyed the debit note.

I have come to the conclusion that the Crown has proved its case beyond any reasonable doubt. I accordingly find the accused guilty as charged in the main charge.

Both my assessors agree.

SENTENCE; Six (6) years' imprisonment.

ORDER; The sum of M1200-00 which was found in the possession of the accused must be returned to Lesotho Bank. The passport must be destroyed. The cheque book and the cheques must also be destroyed. Order to be read to accused by Registrar.

(J.L. KHEOLA)
CHIEF JUSTICE

20th June, 1994

For Crown - Mr. Lenono
For Accused - Mr. Matocane.